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Review of the Supreme Court's 1990-01 Term and Preview of the 1991-92 Term for the Transnational Practitioner

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Review of the Supreme Court's 1990-91 Term and Preview of the 1991-92 Term for the Transnational Practitioner

J. Clark Kelso*

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I. INTRODUCTION

Last year, my only prediction was that the Supreme Court would reverse the decision in *Floyd v. Eastern Airlines*,¹ where the Eleventh Circuit held that a plaintiff could recover for purely emotional injury under section 17 of the Warsaw Convention.² The Court obliged by unanimously reversing the Eleventh Circuit.³

Justice Souter was going through his confirmation hearings when this article went to press last year, and I noted that he "is essentially an unknown quantity here in the United States."⁴ Because he wrote few opinions during the 1990-91 Term,⁵ Justice Souter's views are still largely unknown.

The end of the 1990-91 Term saw the resignation of Justice Thurgood Marshall from the Court. President Bush quickly nominated Judge Clarence Thomas of the United States Court of Appeals for the District of Columbia to fill Marshall's seat on the Court. After lengthy and fractious confirmation hearings before the Senate Judiciary Committee, Thomas was ultimately confirmed by the Senate in a close vote. Justice Thomas is the 106th Justice of the U.S. Supreme Court. Again, as explained below, very little is known about this Bush nominee to the Court, and it is uncertain how Justice Thomas will affect the Court's decisions.⁶

1. 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991). *See infra* note 3 and accompanying text (noting that the Court reversed the Eleventh Circuit's decision). *See also infra* Part III.A. (analyzing the *Eastern Airlines* decision as it pertains to the transnational practitioner).

2. Kelso, *Review of the Supreme Court's 1989-90 Term and Preview of the 1990-91 Term for the Transnational Practitioner*, 3 *TRANSNAT'L LAW.* 393, 424 (1990).

3. *Eastern Airlines v. Floyd*, 111 S. Ct. 1489 (1991) (Marshall, J.).

4. Kelso, *supra* note 2, at 395.

5. *Virginia Bankshares v. Sandberg*, 111 S. Ct. 2749 (1991); *Schad v. Arizona*, 111 S. Ct. 2491 (1991); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166 (1991); *Gollust v. Mendell*, 111 S. Ct. 2173 (1991); *Yates v. Evatt*, 111 S. Ct. 1884 (1991); *Illinois v. Kentucky*, 111 S. Ct. 1877 (1991); *Ford v. Georgia*, 111 S. Ct. 850 (1991).

6. *See infra* Part IV.B. (discussing the confirmation of Justice Thomas).

II. EXECUTIVE SUMMARY

A. Emotional Injury Under the Warsaw Convention

In *Eastern Airlines v. Floyd*,⁷ the Court held that there could be no recovery under the Warsaw Convention for purely emotional harm. The decision is welcome news to the airline industry, which otherwise might have been exposed to wide ranging claims of emotional harm resulting from near misses (which occur with greater frequency than do accidents resulting in injury or death).

B. Forum Selection Clauses

In *Carnival Cruise Lines v. Shute*,⁸ the Court upheld a forum selection clause on the back of a passenger ticket for an ocean cruise in a suit for personal injuries suffered by the plaintiff while on the cruise. The plaintiff, a Washington resident, will be forced to litigate her claim, if at all, in the State of Florida, the site specified by the forum selection clause and the location of Carnival Cruise Lines' headquarters.

C. Extraterritorial Application of Title VII

In *Equal Employment Opportunity Commission (EEOC) v. Arabian American Oil Co.*,⁹ the Court held that Title VII, which proscribes discrimination in employment on the basis of race, color, religion, gender, or national origin, does not apply to the employment overseas of a United States citizen by a U.S. employer. The holding recognizes that the extraterritorial application of United States law may create special problems of international comity. Congress can amend Title VII to overrule the decision, and legislation has already been introduced to accomplish that result.

7. 111 S. Ct. 1489 (1991). See *infra* Part III.A.

8. 111 S. Ct. 1522 (1991). See *infra* Part III.B.

9. 111 S. Ct. 1227 (1991). See *infra* Part III.C.

III. REVIEW OF THE 1990-91 TERM

A. *Eastern Airlines v. Floyd: No Liability Under Section 17 of the Warsaw Convention for a Purely Emotional Injury*

The plaintiffs were passengers on an Eastern Airlines flight from Miami, Florida, to Nassau, Bahamas. After take-off, all three engines failed, and the crew informed the passengers that they would be forced to ditch the plane in the Atlantic Ocean. A disaster was averted when the crew restarted the engines, and the plane safely landed back in Miami. The plaintiffs filed suit against Eastern, asserting claims under both the Warsaw Convention and under state law. Emotional distress was the only damage claimed in the original complaint.

The district court dismissed all of the emotional distress claims.¹⁰ The Eleventh Circuit Court of Appeals reversed the district court's judgment, and held that a cause of action for purely emotional injury existed under section 17 of the Warsaw Convention.¹¹ The court also held that although the State of Florida recognized a cause of action for purely emotional injury,¹² that cause of action was preempted by the Warsaw Convention.¹³ The Supreme Court granted a writ of certiorari to review the Eleventh Circuit's interpretation of section 17 of the Warsaw Convention.¹⁴

10. *In re Eastern Airlines, Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F. Supp. 307, 316 (S.D. Fla. 1986), *rev'd* *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

11. *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1480 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

12. 872 F.2d at 1466-67.

13. *Id.* at 1480-83.

14. The questions contained in the petition for a writ of certiorari did not include the preemption holding. *See Eastern Airlines v. Floyd*, 59 U.S.L.W. 3018 (U.S. July 17, 1990) (setting forth questions for review by the Court). The Court refused to reach the issue of preemption in its opinion. *Eastern Airlines*, 111 S. Ct. at 1502.

The text at issue in *Eastern Airlines* is from article 17 of the Warsaw Convention. French is the governing text for the Warsaw Convention,¹⁵ and article 17 provides as follows in the French version:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.¹⁶

Roughly translated, the first portion of article 17 says, "The carrier is responsible for damages sustained in case of death, of wounding or of all other bodily injuries suffered by a passenger."¹⁷ The issue before the Court was whether article 17's limitation to *lésion corporelle* (bodily injuries) excluded recoveries for purely emotional harm.¹⁸

In *Chan v. Korean Air Lines*,¹⁹ which arose under the Warsaw Convention, the Court applied a plain meaning approach to interpretation of the Warsaw Convention.²⁰ Under the plain meaning approach, the ordinary meaning of the Convention's text is to control unless the text is ambiguous.²¹ Justice Scalia, author

15. See *Air France v. Saks*, 470 U.S. 392, 397 (1985).

16. 111 S. Ct. at 1493 (emphasis omitted) (quoting Convention Pour L'Unification de Certaines Règles Relatives au Transport Aérien International, ch. 3, art. 17, 49 Stat. 3005 (1934)). See *infra* note 17 and accompanying text (translating the text and the Convention's name from French into English).

17. The American translation, approved by the Senate in 1934, provides that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger" Convention for the Unification of Certain Rules Relating to International Transportation by Air, ch. 3, art. 17, 49 Stat. 3018 (1934).

18. In *Eastern Airlines*, the plaintiffs did not argue that purely emotional harm constituted either *mort* (death) or *blessure* (wounding). 111 S. Ct. at 1494.

19. 490 U.S. 122 (1989). See generally Note, *Chan v. Korean Air Lines, Ltd.: The United States Supreme Court "Shoots Down" Notice Requirements Under the Warsaw Convention*, 3 TRANSNAT'L LAW. 363 (1990) (authored by Richard M. Clark).

20. Kelso, *supra* note 2, at 365.

21. *Id.*; *Chan*, 490 U.S. at 134.

of the *Chan* opinion, has in other opinions rather stridently advocated total reliance solely upon the text of positive law.²²

Justice Marshall's opinion for the Court in *Eastern Airlines* suggests that Scalia's views on interpreting conventions, constitutions, and statutes are not shared by the whole Court. At the beginning of his analysis, Marshall sets forth a method of interpretation quite different upon Scalia's view. Instead of the text being the final word (as Scalia's view would have it), Marshall indicates that the text is where the Court begins the process of interpretation.²³ Where passages are difficult or ambiguous, the Court may draw upon other general rules or canons of construction.²⁴ In addition, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."²⁵ This formulation of the Court's process of interpretation is somewhat broader than Scalia's formulation, and it permits the Court to consider a much wider set of sources.²⁶

22. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (Scalia, J., concurring); *Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring). Other authors have discussed Scalia's approach. See Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437 (1988); Comment, *The Role of Legislative History in Statutory Interpretation: A New Era After the Resignation of Justice William Brennan?*, 56 MO. L. REV. 121 (1991).

23. "When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines*, 111 S. Ct. at 1493 (Marshall, J.) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)). Perhaps in a playful mood, Justice Marshall gave Scalia's *Chan* opinion an accord citation. *Id.* Accord is customarily supposed to signal that the cited case "directly support[s] the proposition." HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION § 2.2, at 8 (14th ed. 1986). Scalia would disagree that *Chan* directly supports Marshall's views on the interpretation of treaties. Indeed, in *Chan* Marshall joined Brennan's concurring opinion, rejecting Scalia's use of the plain meaning rule. 490 U.S. at 136 (Brennan, J., concurring).

24. 111 S. Ct. at 1493.

25. *Id.* at 1493 (quoting *Air France v. Saks*, 470 U.S. at 396).

26. Justice Scalia joined Marshall's opinion for a unanimous Court in *Eastern Airlines*, but that does not portend a change in his views. Although Marshall's initial formulation of the Court's process of interpretation would permit the Court in most cases to look beyond the mere text, the structure of Marshall's opinion is consistent with Scalia's approach. After concluding that the text of section 17 would exclude purely emotional loss, Marshall explains that because the term *lésion corporelle* is "both ambiguous and difficult . . . we turn to additional aids to construction." *Id.* at 1497. Accordingly, the opinion in *Eastern Airlines* can be read as consistent with Scalia's view in *Chan* that the text governs unless ambiguous.

The plain meaning of article 17 would seem to exclude recovery for purely mental harm. The court of appeals recognized in its opinion that a literal interpretation of the phrase *lésion corporelle* would exclude recovery for purely emotional harm.²⁷ The Supreme Court, citing several French dictionaries and the official translations of the United States and the United Kingdom, came to the same conclusion.²⁸ The Court concluded that “neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that ‘lésion corporelle’ should be translated other than as ‘bodily injury’—a narrow meaning excluding purely mental injuries.”²⁹

Under Scalia’s approach, the inquiry would have been at an end at this point. Marshall continues the analysis, however, by consulting the negotiating history of the Warsaw Convention and the conduct and interpretations of the signatories subsequent to the adoption of the Convention in 1929.³⁰ After reviewing these materials, the Court concluded that nothing in the negotiating history or subsequent conduct was inconsistent with a narrow definition of *lésion corporelle*.³¹

B. Carnival Cruise Lines v. Shute: Forum Selection Clause in a Form Contract for an Ocean Cruise is Enforceable

Responding to Carnival Cruise Lines’ [hereinafter Carnival] attractive commercial advertising, Eulala and Russel Shute, residents in the State of Washington, contacted their local travel agent and requested tickets for a seven-day Carnival Cruise from Los Angeles to Puerto Vallarta, Mexico. Carnival’s policy requires prepayment for tickets, and the Shutes dutifully tendered the purchase price before receiving the tickets. During a tour of the ship’s galley, Mrs. Shute was injured when she slipped on a deck mat. The ship was in international waters at the time of the injury.

27. 872 F.2d at 1471, *rev’d*, 111 S. Ct. 1489.

28. 111 S. Ct. at 1494-95.

29. *Id.* at 1497.

30. *Id.* at 1497-1502.

31. *Id.* at 1497.

Mrs. Shute filed her suit in the U.S. District Court for the Western District of Washington. Washington was, after all, the place where she had heard Carnival's advertisements, the place where she had purchased her ticket, the place where her doctor (who would testify at trial) resided, and the place where she lived. To her chagrin, if not her surprise,³² the ticket contained a forum selection clause providing that all suits "shall be litigated, if at all, in and before a Court located in the State of Florida."³³

The district court dismissed the complaint on jurisdictional grounds, finding that Carnival had insufficient contacts to justify the exercise of jurisdiction under Washington's long-arm statute.³⁴ The Ninth Circuit Court of Appeals reversed, finding that Carnival's commercial activities directed at Washington State were constitutionally sufficient to support personal jurisdiction.³⁵ Reaching an issue that was briefed by the parties, but not decided by the district court,³⁶ the court of appeals also held that the forum selection clause was invalid under the rule established in *The Bremen v. Zapata Off-Shore Co.*³⁷

The Supreme Court reversed, in a 7-2 decision, holding that the forum selection clause was enforceable under *The Bremen*.³⁸ *The Bremen* involved the enforceability of a choice of forum clause in a contract freely negotiated between two sophisticated international businesses. Zapata, a Texas-based American corporation, entered into a contract with Unterweser, a German corporation, to tow a self-elevating oil drilling rig from Louisiana to the coast of Italy.

32. But see *infra* text accompanying note 50 (Plaintiffs conceded having actual notice of the forum selection clause).

33. 111 S. Ct. at 1524.

34. *Id.*

35. The Ninth Circuit first issued an opinion finding jurisdiction under Washington's long-arm statute and declaring the forum selection clause to be unenforceable. 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (9th Cir. 1989). After withdrawing its first opinion, the appeals court certified the personal jurisdiction question to the Washington Supreme Court. 872 F.2d 930 (9th Cir. 1989). The Washington Supreme Court held that personal jurisdiction existed under Washington's long-arm statute. 113 Wash.2d 763, 783 P.2d 78 (1989). The Ninth Circuit then refiled its original opinion with appropriate modifications. 897 F.2d 377 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991).

36. 897 F.2d at 389, *rev'd*, 111 S. Ct. 1522.

37. 407 U.S. 1 (1972).

38. *Carnival Cruise Lines*, 111 S. Ct. at 1528.

The contract provided that "[a]ny dispute arising must be treated before the London Court of Justice."³⁹ Unterweser's towing operation ran into a severe storm in the Gulf of Mexico, and Zapata's rig was damaged. Notwithstanding the forum selection clause, Zapata brought suit against Unterweser in the U.S. District Court at Tampa, Florida, for negligence and breach of contract.⁴⁰

The Court's opinion in *The Bremen* adopted the position taken in section 80 of the Second Restatement of Conflicts of Laws, that a forum selection clause "will be given effect unless it is unfair or unreasonable." In so holding, the Court rejected the characterization of forum selection clauses by many courts as an illegitimate attempt to "oust the jurisdiction" of the court.⁴¹ In place of this outdated analysis, the Court recognized the importance to transnational transactions of agreements between the parties concerning the most appropriate form of dispute resolution and the proper location for dispute resolution.⁴² The Court held in *The Bremen* that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a . . . clear[] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁴³

The decision in *Carnival Cruise Lines*, upholding the enforceability of the forum selection clause, reaffirms the importance of private agreements regarding dispute resolution. American courts used to guard their jurisdiction most jealously, striking down as against public policy agreements to arbitrate, choice of law clauses and choice of forum clauses.⁴⁴ *The Bremen*

39. 407 U.S. at 2.

40. *Id.* at 3-4.

41. *Id.* at 9-10.

42. *Id.* at 12-15.

43. *Id.* at 15. The enforceability of forum-selection clauses prior to *Carnival Cruise Lines* has been extensively analyzed. See generally Comment, *Enforcing Forum-Selection Clauses: The Federal Court Dilemma and the Arbitration Clause Alternative*, 1990 J. DISPUTE RESOLUTION 401; Note, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA L. REV. 175 (1989); Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 DEN. L.J. 837 (1988).

44. See *The Bremen*, 407 U.S. at 10 n.10 (citing cases that struck choice of forum, choice of law, and arbitration clauses).

was one in a constellation of Supreme Court decisions recognizing the validity and usefulness of private agreements resolving in advance many of the preliminary procedural issues that arise in any dispute.⁴⁵

The Court's decision in *Carnival Cruise Lines* could rather easily be misread as entirely rejecting judicial scrutiny of forum selection clauses. After all, if the Court is to enforce a forum selection clause appearing on the reverse side of a common carrier's preprinted, nonnegotiable passenger ticket, when that clause requires a west coast resident to litigate on the east coast, what sort of forum selection clauses would the Court find unreasonable?

Fortunately, *Carnival Cruise Lines* can readily be limited to its somewhat peculiar litigation history. First, recall that, as mentioned above, the district court dismissed the case for lack of personal jurisdiction. As a result of its dismissal on those grounds, the district court did not reach the validity of the forum selection clause and made no findings whatsoever with respect to the validity of that clause. Notwithstanding the absence of any factual record on the issue, the court of appeals accepted the invitation of the parties to decide the question, and the court of appeals made its own factual findings regarding the effect of the clause.⁴⁶ The Supreme Court was not as charitable as the court of appeals, however, and declared that the absence of fact findings by the district court left the record essentially empty on the issue of hardship to the Shutes.⁴⁷ Counsel in subsequent cases should be sure to make an appropriate factual record in the district court.

45. See, e.g., *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 470 (1989) (agreement to arbitrate); *Volt Information Services v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) (agreement to arbitrate and choice of law clause); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (agreement to arbitrate and choice of law clause); *Nat'l Equip. Rental v. Szukhent*, 375 U.S. 311 (1964) (private party may consent to jurisdiction even in a state where that private party cannot be found by contractually appointing an agent for receipt of process); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564 (1960) (agreement to arbitrate).

46. In particular, the court of appeals found that there was "evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." 897 F.2d at 389.

47. 111 S. Ct. at 1527-28.

Second, counsel for Mrs. Shute essentially conceded that *The Bremen* controlled despite the substantial differences between the facts in *The Bremen* and the facts in *Carnival Cruise Lines*.⁴⁸ Although *The Bremen* may indeed reflect the Court's analytic framework for all forum selection clauses, conceding the point made the Court's opinion in *Carnival Cruise Lines* much easier to write. As Justice Stevens pointed out in dissent, "*The Bremen*, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets."⁴⁹ Arguably, the decision in *Carnival Cruise Lines* can be distinguished on the ground that, in light of respondent's concession, the Court had no occasion to consider whether *The Bremen* should have applied at all.

Third, counsel for Mrs. Shute somewhat off-handedly (one might even say carelessly) conceded in his brief to the Court that the Shutes had actual notice of the forum selection clause.⁵⁰ The Court accepted this concession and treated the case as though it did not involve "the question whether respondents had sufficient notice of the forum clause before entering the contract for passage."⁵¹ Because of this concession, the Court could ultimately claim that the Shutes "retained the option of rejecting the contract with

48. Part II of Respondents' brief to the Court began with the following paragraph: "The most prominent case involving forum selection clauses is [*The Bremen*]. At least in the context of commercial towing contracts, that case controls the validity of the forum selection clauses. While it is questionable whether the same policy considerations should govern a contract for cruise ship passengers, the holding and reasoning of that case applies here to resolve this matter in Respondent's [sic] favor." Brief for the Respondents at 25, *Carnival Cruise Lines* (No. 89-1647). The Court properly read this language as a concession that *The Bremen* governs this case. 111 S. Ct. at 1526.

49. 111 S. Ct. at 1531 (Stevens, J., dissenting).

50. The brief for the Shutes contains the following argument: "Petitioner spends considerable time in its brief discussing whether the forum selection clause was incorporated in the ticket and that it was reasonably communicated to the respondents. These are not relevant issues in this case. The respondents do not contest the incorporation of the provisions nor that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated. The issue is whether the forum selection clause should be enforced, not whether Respondents received the ticket." Brief for the Respondents at 26, *Carnival Cruise Lines* (No. 89-1647). It is unclear whether counsel really intended this language to concede that the Shutes had actual knowledge of the forum selection clause. Nevertheless, counsel for Carnival noted the concession, and the Court agreed.

51. 111 S. Ct. at 1525.

impunity," an option that fatally undermined the Shutes' argument that the forum selection clause was unfairly imposed upon them.⁵²

Because of this litigation history, the case presented to the Supreme Court was in many respects unusual and incomplete. Taking the various concessions together, the Court was asked to declare unenforceable a forum selection clause even though the buyer had actual notice of the clause and could have refused to purchase the ticket, the record contained no fact-finding that enforcement of the clause would create undue hardships upon the plaintiff, and the plaintiff conceded the application of a case (i.e., *The Bremen*) which involved a commercial transaction between two sophisticated businesses engaged in transnational transactions. If this is what *Carnival Cruise Lines* is all about, then its holding is quite narrow.

There is, however, language in *Carnival Cruise Lines* suggesting that the Court may be serious about its extension of *The Bremen* to form contracts presented on a take-it-or-leave-it basis to consumers who lack bargaining power. Courts often have treated such contracts as adhesive in nature and subject to heightened judicial scrutiny.⁵³ What for other courts has been a vice—the lack of bargaining over terms in such contracts—is trumpeted by the Supreme Court as a virtue. According to the Court,

[I]t would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.⁵⁴

Having disposed of the worry over adhesion contracts, the Court then proposes three reasons why a forum selection clause is substantively reasonable. First, a cruise line has a "special interest

52. *Id.* at 1528.

53. *See, e.g.*, E.A. FARNSWORTH, *CONTRACTS* §§ 4.26, 7.1, 7.11 (2d ed. 1990).

54. 111 S. Ct. at 1527.

in limiting the fora in which it potentially could be subject to suit'' because passengers could come from virtually anywhere, subjecting the cruise line to suit from virtually anywhere.⁵⁵ Second, enforcing the forum selection clause will reduce confusing litigation over where the suit must be brought.⁵⁶ Third, the savings to the company from being able to litigate only in Florida will—assuming a competitive market—be passed on to consumers in the form of lower fares.⁵⁷ By appearing to accept at face value these proffered justifications for a forum selection clause, the Court has gone a long way towards a federal rule making all forum selection clauses enforceable.⁵⁸ If true, the plaintiffs' only remedy for an inconvenient forum appears to be a motion to transfer venue.⁵⁹

C. EEOC v. Arabian American Oil Co.: *Title VII Does Not Apply Extraterritorially to United States Employers That Employ U.S. Citizens Abroad*

Generally, discrimination in employment on the basis of race, color, religion, gender, or national origin is contrary to title VII of the Civil Rights Act of 1964.⁶⁰ The extraterritorial application of

55. *Id.*

56. *Id.*

57. *Id.*

58. Each of these reasons has a convincing reply. First, if Carnival wants to do business internationally, it should be ready to defend itself internationally. Moreover, suit in Washington could not have come as a shock to Carnival since Carnival advertises in Washington and does a substantial amount of business there. Second, confusion over where suit may be brought could just as easily be reduced by a rule that makes forum selection clauses in passenger tickets per se unenforceable. Third, all exculpatory clauses have the effect of reducing the cost to the business and, in a theoretically competitive market, the price to consumers. That consumer prices may (but probably will not) be reduced as a result of the Court's holding in *Carnival Cruise Lines* does not indicate that the rule is a good one.

59. 28 U.S.C. § 1404 (1988); *Stewart Org. v. Richo Corp.*, 487 U.S. 22 (1988) (holding that the existence of a forum selection clause was important but not always determinative when considering a motion to transfer venue). See generally Newman, *Forum Selection Clauses in Commercial Loan Documents: Unimpeachable or Unenforceable?*, 107 BANKING L.J. 547 (1990).

60. 42 U.S.C. § 2000e (1988). There are several situations in which Title VII does not apply. For example, Title VII does not apply to employers employing fewer than 15 workers. *Id.* § 2000e(b). Religious institutions employing individuals of particular religions are also exempt from Title VII. *Id.* § 2000e-1.

Title VII to the employment practices of United States employers who employ U.S. citizens abroad has long been an unsettled question. Title VII expressly exempts from its coverage the employment of non-United States citizens beyond U.S. borders.⁶¹ Several lower courts had held, however, that Title VII applied extraterritorially to the overseas employment of United States citizens.⁶² The Court resolved the issue in *EEOC v. Arabian American Oil Co.*,⁶³ holding that Title VII did not apply extraterritorially to the overseas employment of United States citizens.

The starting point for the Court's analysis was the "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"⁶⁴ There is, in other words, a presumption against the extraterritorial application of U.S. law. The presumption can be overcome only by a clearly expressed congressional intent for extraterritorial application.⁶⁵

The presumption against extraterritorial application, and the requirement of a clear expression from Congress, serve important goals. Whenever United States law applies extraterritorially, there is a risk that it may clash with foreign law.⁶⁶ Courts are ill-suited to the task of balancing such conflicting interests. Such a balancing, which obviously involves considerations of foreign policy, is more appropriately done in the first instance by the Congress and the Executive Branch. The presumption and the clear

61. *Id.* § 2000e-1 ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State").

62. See, e.g., *Bryant v. Int'l Schools Serv.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978).

63. 111 S. Ct. 1227 (1991) (Rehnquist, C.J.).

64. *Id.* at 1230 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *Blackmer v. United States*, 284 U.S. 421 (1932); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

65. 111 S. Ct. at 1230.

66. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1986) (listing factors which may make it unreasonable for one sovereign to attempt to exercise prescriptive jurisdiction over a foreign national).

expression rule protect the Judiciary from this sort of policy-making. If Congress is forced clearly to express an intention for extraterritorial application, it is likely that Congress (or the Executive) will also explicitly confront the foreign relations impact of such legislation and build into the legislation such safeguards as are appropriate.

As already noted, Title VII contains an explicit exemption with respect to the employment of aliens outside of the United States.⁶⁷ The plaintiffs in the case argued that this exemption, which was limited to the employment of aliens overseas, supported, by negative implication, a finding of congressional intent to apply Title VII to the overseas employment of U.S. citizens.⁶⁸ Plaintiffs' argument was deficient in several respects and was rejected by the Court.

First, although the negative implication was certainly one possible interpretation of the alien exemption provision, that provision had an independent meaning and effect entirely apart from the negative implication. In particular, the alien exemption provision had been interpreted by the Court to imply that although aliens were not protected when employed overseas, they were protected when employed within the United States.⁶⁹ In light of the presumption against extraterritorial application and the clear expression rule, the Court was unwilling to draw the requested inference.⁷⁰

Second, if Title VII were interpreted to protect United States citizens employed overseas, then Title VII would apply not only to United States employers that employ U.S. citizens overseas, but also to foreign employers that employ U.S. citizens overseas.⁷¹ This result would occur because Title VII's definition of an employer does not limit its scope to United States employers.⁷²

67. 42 U.S.C. § 2000e-1.

68. 111 S. Ct. at 1233.

69. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

70. 111 S. Ct. at 1234.

71. *Id.*

72. 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

This would mean that a French employer, for example, might be subject to Title VII when employing a United States citizen.⁷³ Such a dramatic extension of U.S. employment law was clearly not contemplated by Congress and, indeed, would have stretched the boundaries of Congress' prescriptive jurisdiction.⁷⁴

Plaintiffs also argued that Title VII's broad jurisdictional provisions evidenced Congress' intent that Title VII apply extraterritorially. This was an especially weak argument because Title VII's jurisdictional provisions employ the same sort of boilerplate commerce clause language that appears in many federal statutes. Title VII applies to employers "engaged in an industry affecting commerce,"⁷⁵ and "'commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof"⁷⁶ The Court's clear expression rule would in effect be a nullity if this type of broadly-phrased definition of commerce were sufficient to indicate congressional intent for extraterritorial application, and the Court rejected the plaintiffs' argument.⁷⁷

The Court's decision appears to be sound. As a matter of employment law policy, there are good reasons that Title VII should apply to the overseas employment by United States companies of U.S. citizens. It is, however, for Congress to make that extension and not for the courts. Courts extending Title VII to overseas employment decisions risk creating conflicts between United States and foreign law and imposing special hardships for United States companies attempting to do business overseas.

In response to the Court's decision, legislation has been introduced to extend Title VII to the overseas employment of

73. 111 S. Ct. at 1234.

74. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403.

75. 42 U.S.C. § 2000e(b).

76. *Id.* § 2000e(g) (1988); see *id.* § 2000e(h) (defining an industry affecting commerce).

77. 111 S. Ct. at 1231-32.

United States citizens.⁷⁸ The legislation would insulate an employer from liability only when compliance with Title VII “would cause such employer . . . to violate the law of the foreign country in which such workplace is located.”⁷⁹ The bill also clearly excludes from Title VII “the foreign operations of an employer that is a foreign person not controlled by an American employee.”⁸⁰ That this legislation’s drafter saw a need to limit Title VII’s extraterritorial reach supports the Court’s clear expression rule and reluctance to apply U.S. laws overseas in the absence of such a clear expression.

IV. PREVIEW OF THE 1991-92 TERM

A. *Defenders of Wildlife v. Lujan*:⁸¹ *Extraterritorial Application of the Endangered Species Act to U.S. Governmental Operations*

With the enactment of the Endangered Species Act of 1973,⁸² the United States established itself as a world leader in the fight to preserve vanishing wildlife.⁸³ The Act directs the Secretary of the Interior to create what is commonly known as the Endangered Species List,⁸⁴ and species appearing on that list are accorded extraordinary protection from harm.⁸⁵

78. American Employees Equity Act of 1991, H.R. 1694, 102d Cong., 1st Sess. (1991) (sponsored by Rep. William J. Jefferson) (“A bill to amend the Civil Rights Act of 1964 to ensure that title VII of such Act applies to the employment of United States citizens by certain employers in foreign nations.”).

79. *Id.*

80. *Id.*

81. 911 F.2d 117 (8th Cir. 1990), *reh’g denied*, 1990 U.S. App. LEXIS 22,299 (8th Cir. Dec. 10, 1990) (en banc), *cert. granted*, 111 S. Ct. 2008 (1991).

82. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-44 (1988)).

83. According to the Court, the Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

84. 16 U.S.C. § 1533.

85. The Act contains a long list of prohibited conduct regarding endangered species. *Id.* § 1538. To give merely a taste of the breadth of the Act’s proscriptions, it is contrary to the Act “for any person subject to the jurisdiction of the United States” to import or export any endangered species or to “take any such species within the United States or the territorial sea of the United

Section 7(a) of the Act provides that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species”⁸⁶ The Department of the Interior in the Carter Administration enacted a regulation which required federal agencies to consult with the Secretary concerning actions in foreign countries.⁸⁷ The Reagan Administration changed course, however, and enacted a regulation which limited the consultation obligation to actions “in the United States or upon the high seas.”⁸⁸ The Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States, filed suit against the Secretary of the Interior, Manuel Lujan, challenging the validity of the regulatory change as contrary to section 7(a) of the Act.

The Court granted a writ of certiorari to consider two important questions under the Act: (1) Do the plaintiffs have standing to challenge the regulations? (2) If the plaintiffs do have standing, is the regulation consistent with section 7(a) of the Act?⁸⁹

The standing issue raises difficult questions under both the Act and Article III of the U.S. Constitution. According to the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church & State*,⁹⁰ “[a]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to [1] ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,’ . . . [2] that the injury ‘fairly can be traced to the challenged

States . . . or upon the high seas.” *Id.* § 1538(a)(1). “‘[T]ake’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

86. *Id.* § 1536(a)(2). There are, of course, certain statutory exceptions to the application of this provision. National security interests, for example, override the obligation created by section 7(a). *Id.* § 1536(j).

87. 50 C.F.R. § 402.04 (1978).

88. 50 C.F.R. § 402.01 (1986).

89. 111 S. Ct. 2008 (1991). The Court of Appeals for the Eighth Circuit held that the plaintiffs have standing and that the regulation is inconsistent with the Act. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

90. 454 U.S. 464 (1982).

action,' and [3] 'is likely to be redressed by a favorable decision.'⁹¹ The Secretary argued that the plaintiffs failed to establish that they personally (or their members personally) had suffered some actual or threatened injury.⁹²

Attempting fully to describe the law of standing in the few pages allocated for this article would be like trying to cross the Pacific Ocean in an eight-foot dinghy. Readers are invited to consult any of the scores of articles devoted to this topic.⁹³ Resolution of the issue in this case involves two distinct avenues of approach.

First, the plaintiffs have submitted several affidavits from members asserting that these members have personally visited specific sites overseas where U.S. government agency projects may harm endangered species.⁹⁴ Following *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,⁹⁵ courts have often accepted this type of affidavit as establishing Article III standing for environmental groups representing the interests of their members.

91. *Id.* at 472 (citations omitted).

92. The Secretary did not raise objections on the second or third prongs of the *Valley Forge* test. *Defenders of Wildlife*, 911 F.2d at 119.

93. See Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 *ECOLOGY L.Q.* 335 (1990); Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 *N.Y.U. L. REV.* 1239 (1989); Sunstein, *Standing and the Privatization of Public Law*, 88 *COLUM. L. REV.* 1432 (1988); Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221 (1988); Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 *B.C. ENVTL. AFF. L. REV.* 135 (1987); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U.L. REV.* 881 (1983); Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 *HARV. L. REV.* 4 (1982). See generally 13-13A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §§ 3531-3531.16 (2d ed. 1984).

94. For example, one "member of Defenders stated in her sworn affidavit that she had visited Sri Lanka in order to observe its wildlife and animal habitat, and that she intended to return in the future for the same purpose. She stated that she would be harmed by the Mahaweli project in Sri Lanka, funded by the federal Agency for International Development (AID), because of its impact on wildlife In her deposition testimony, she also described her wildlife viewing activities in Sri Lanka, stated that she had visited the Mahaweli project, and expressed her intent to return to that area to view wildlife." *Defenders of Wildlife*, 911 F.2d at 120 (quoting Appellees' App. I, at 169-71 (Nos. 89-5192, 89-5386)) (statement by Amy Skilbred).

95. 412 U.S. 669 (1973).

SCRAP is not, however, the Court's most recent pronouncement in this area. In *Lujan v. National Wildlife Federation*,⁹⁶ the Court denied standing to an environmental group when the affidavits on standing alleged "only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."⁹⁷ *Lujan* arose on a Rule 56(e) motion for summary judgment under the Federal Rules of Civil Procedure. The Court distinguished *SCRAP* because it arose on a Rule 12(b) motion to dismiss.⁹⁸ Although this distinction is technically a valid one,⁹⁹ it suggests the Court is not firmly committed to *SCRAP*'s broad view of standing.¹⁰⁰

The affidavits presented by the plaintiffs are more specific than the affidavits found insufficient in *Lujan*. They may not be specific enough, however, since there apparently are no allegations that any endangered species are actually affected by the overseas government projects identified in the affidavits.

The second approach to standing in this case begins with the citizen standing provision of the Endangered Species Act. According to section 11(g) of the Act, "any person may commence a civil suit on his own behalf — (A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter."¹⁰¹ The plaintiffs in both *Lujan* and *SCRAP* premised standing upon section 10(a) of the Administrative Procedure Act (APA), which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or

96. 110 S. Ct. 3177 (1990).

97. *Id.* at 3189.

98. *Id.*

99. On a Rule 12(b) motion to dismiss, the court is required to draw all reasonable inferences in favor of the nonmoving party. Among other things, this means a presumption "that general allegations embrace those specific facts that are necessary to support the claim." *Id.* Rule 56(e), by contrast, requires the nonmoving party to submit affidavits or other evidence which "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added).

100. The Court's lack of commitment to *SCRAP* is clearly apparent in its description of *SCRAP* as an "opinion, whose expansive expression of what would suffice for [judicial] review under its particular facts has never since been emulated by this Court." *Lujan v. Nat'l Wildlife Fed'n*, 110 S. Ct. at 3189.

101. 16 U.S.C. § 1540(g).

aggrieved by agency action . . . is entitled to judicial review thereof.”¹⁰² Comparing these provisions, it is clear that section 11(g) of the Endangered Species Act contemplates a larger class of possible plaintiffs than does section 10(a) of the APA. Section 11(g) indicates that any person may sue; it does not say that “any person injured, adversely affected or aggrieved” may sue.

If the Court interprets section 11(g) as broadly as section 11(g)’s words suggest, a difficult constitutional question will be presented. May Congress constitutionally permit any person to sue even if that person has not been injured? This issue was not squarely faced in *SCRAP* or *Lujan*, which arose under the APA, or in *Valley Forge Christian College*, where the plaintiffs claimed standing either under the APA or as taxpayers in the absence of a statute specifically granting taxpayer standing.

How far can Congress go in granting standing? The Court indicated in *Valley Forge Christian College* that “[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.”¹⁰³ This would suggest that section 11(g) of the Endangered Species Act is unconstitutional. On the other hand, after rejecting standing under the APA because the plaintiffs had not demonstrated the loss of any rights, the Court in *Valley Forge* indicated that “there is no other basis for arguing that [the APA’s] existence alters the rules of standing otherwise applicable to this case.”¹⁰⁴ By this language, the Court appears to have reserved the question of whether Congress could enact a statute that would alter the rules of standing applicable to a particular case. Section 11(g) may be just such a statute, creating a special type of Endangered-Species-Act-injury which all of us suffer when someone violates the Act.

Even if the Court holds that standing exists—and there remains a significant risk that the Court will throw out plaintiffs’ case based on the standing issue—the Court will likely rule in the government’s

102. 5 U.S.C. § 702 (1988).

103. 454 U.S. at 487 n.24.

104. *Id.*

favor on the merits. Restating the substantive issue in the case, the question is whether the Department of Interior's 1983 regulation excluding from the consultation requirement federal agency actions taken in foreign countries is consistent with the Act.

Analysis of this issue must begin with a recognition of an administrative agency's role in the interpretation of the statute under which it operates. Courts ordinarily defer to an administrative construction of a statute unless the intent of Congress is clear on the matter.¹⁰⁵ If the intent is not clear, then the question is only "whether the agency's answer is based on a permissible construction of the statute."¹⁰⁶

The first question then is whether the relevant section of the Endangered Species Act is clearly intended to have an extraterritorial effect. The Court will begin its analysis of this question with a presumption against extraterritorial application of United States law. As stated in *EEOC v. Arabian American Oil Co.*,¹⁰⁷ an act will not be given extraterritorial effect unless "the affirmative intention of the Congress [is] clearly expressed."¹⁰⁸

The relevant section of the Endangered Species Act, section 7(a), provides that

[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption

105. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), *reh'g denied*, 480 U.S. 421 (1984).

106. *Id.*

107. 111 S. Ct. 1227 (1991).

108. *Id.* at 1230 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. at 147). *See supra* Parts II.C., III.C. (discussing *EEOC v. Arabian American Oil Co.*).

for such action by the Committee pursuant to subsection (h) of this section.¹⁰⁹

This section does not contain a clear expression of an intent to apply extraterritorially. Although the language is no doubt quite broad (“each federal agency,” “any action,” and “any endangered species”), such unqualified language is, after the Court’s decision in *EEOC v. Arabian American Oil*, insufficient to overcome the presumption against extraterritorial application.

Moreover, other language in section 7 suggests a largely domestic focus. Section 7(a) refers to consultation “with affected States,” and the exemption procedures in section 7 provide an explicit role for a representative of an affected state to participate in the decision of whether to grant an exemption.¹¹⁰ Section 7 does not, however, provide any role for consultation with a foreign sovereign which may be adversely affected. The statute’s failure to provide a such a role strongly suggests that section 7 was intended to apply only domestically. Providing a role for the states recognizes the interest in federalism and federal-state comity; international comity would appear to require a similar role for foreign nations affected by the operation of section 7.

The Court of Appeals for the Eighth Circuit concluded that section 7(a) does apply extraterritorially, and struck down the regulation.¹¹¹ The court’s analysis is unconvincing, however, in light of *Arabian American Oil*. The Eighth Circuit found that the Act was clearly intended to have an extraterritorial effect by focusing on (1) the expansive language in section 7(a); (2) the declaration in section 2 of the Act that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction;”¹¹² (3) the fact that the Secretary must take into account the actions of foreign governments in deciding what wildlife to place on the endangered

109. 16 U.S.C. § 1536(a)(2).

110. *Id.* § 1536(e) (identifying members of the Endangered Species Committee).

111. *Defenders of Wildlife*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008.

112. 16 U.S.C. § 1531(a)(4).

species list and that many species on the list are found only in foreign nations; and (4) the International Cooperation section of the Act which commits the United States to protecting endangered species through international financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs.¹¹³

Each of these arguments is easily rebutted. First, the seemingly expansive language in section 7(a) is insufficient as a matter of law under *Arabian American Oil*. Section 7(a) does not contain a clear expression of Congress' intent for an extraterritorial application of its provisions.

Second, the congressional finding that the United States has pledged itself to the international community to protect endangered species is nothing more than a recognition that the United States has entered into a number of treaties and conventions which have protection of such species as their main object. Indeed, the finding specifically lists six such treaties.¹¹⁴ Section 7(a) is not required by any such international treaty.

Third, the fact that the endangered species list encompasses species worldwide is not inconsistent with limiting section 7(a) to domestic government actions. The Act makes it unlawful to import into the United States any endangered species.¹¹⁵ In order to enforce this section sensibly, the endangered species list must of necessity have a worldwide scope. The issue is not, however, whether some sections of the Act apply extraterritorially (which some obviously do), but whether section 7(a) applies extraterritorially.

One of the difficulties with section 7(a)'s consultation requirement is that it may bring the Secretary of the Interior into conflict with both federal government agencies and with states. Section 7 explicitly provides for cooperation between federal and state governments to minimize those conflicts, but contains no similar provisions to insure cooperation between the United States

113. *Id.* § 1537.

114. *Id.* § 1531(a)(4)(A)-(F).

115. *Id.* § 1538(a)(1).

and foreign governments.¹¹⁶ Congress may rationally have determined that the section 7 consultation requirement would not work well in the international context and that other channels of cooperation (e.g., through bilateral or multilateral treaties) are better suited for coordinating international efforts.

Fourth, Congress actually addressed the issue of international cooperation in the Endangered Species Act in the section immediately following section 7. Section 8 of the Act provides for financial assistance to foreign countries, encouragement of foreign programs, the assignment of personnel to foreign countries, and overseas investigations.¹¹⁷ The existence of this section dedicated explicitly to international cooperation undermines the notion that section 7 is supposed to apply extraterritorially.

The mere existence of these reasonable arguments (and others that will no doubt be made) are sufficient to raise a doubt as to whether section 7 should apply extraterritorially. If there is a reasonable doubt about its extraterritorial application, the Court will defer to the agency's interpretation of Section 7 limiting its effect to domestic government actions, and the Court will accordingly uphold the regulation.¹¹⁸

B. The Confirmation of Justice Clarence Thomas

Justice Thurgood Marshall, appointed in 1967 by President Lyndon Johnson as the first black to serve on the Supreme Court of the United States, announced his resignation from the Court after twenty-four years of service. President Bush quickly nominated then-Judge Clarence Thomas of the United States Court of Appeals for the District of Columbia Circuit to fill Marshall's seat. Justice Thomas is the second black to serve on the Court.

116. *Id.* § 1535(b)-(f).

117. 16 U.S.C. § 1537.

118. In light of the presumption against extraterritorial application of U.S. laws, the Court might even hold that section 7 is limited to domestic programs and that an agency regulation purporting to apply section 7 extraterritorially would be beyond the Secretary's authority under the Act.

Justice Thomas' confirmation hearings before the Senate Judiciary Committee did not go particularly well. Before being appointed to the Court of Appeals in 1989, Justice Thomas was the chairman of the Equal Employment Opportunity Commission (EEOC) during the Reagan Administration. While in that position, Thomas championed a conservative philosophy based in part upon a commitment to natural law principles and in part upon a commitment to individual self-help. Thomas was generally opposed to affirmative action programs as chairman of the EEOC.

The Senate Judiciary Committee attempted to determine the extent to which Judge Thomas brought these conservative views with him to the bench. Over the course of five days of testimony, Judge Thomas successfully put off the committee by asserting that positions which he took as chairman of the EEOC were not necessarily an indication of what he would do as a judge. Thomas repeatedly emphasized the difference between his policy-making position at EEOC and position as a judge, which he testified was largely outside of the realm of policy-making and politics. When the committee members tried to turn from his past positions to his present views, Justice Thomas often deflected the questions by asserting that specific answers to specific questions (such as his views on abortion) would compromise his ability fairly to sit in judgment on cases which would come before him as a justice on the Court.

The final result of the hearings was that neither the committee nor the public has much information upon which to base a prediction concerning how Justice Thomas will vote as a member of the Court.¹¹⁹ Judging from his public statements while at the EEOC, one would have to guess that Justice Thomas will most often join Justice Scalia, thereby solidifying the extreme right wing of the Court. There is of course historical precedent for justices dramatically changing their views once on the Court (e.g., Justice

119. The final days of the confirmation process were spent holding a public hearing on accusations by Professor Anita Hill of the University of Oklahoma School of Law that Thomas had sexually harassed Professor Hill during the early 1980s when she was Thomas' assistant in the Department of Education and at the EEOC. Justice Thomas unequivocally denied all of Professor Hill's allegations, and the full Senate voted to confirm Thomas despite Hill's claim.

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Earl Warren and Justice William Brennan), and only time will tell whether Justice Thomas will emerge as a strong, independent voice on the Court.

